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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 362

SHERMAN S. COHEN, *Petitioner,*

v.

STATE OF MARYLAND, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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The petitoner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland entered in the above-entitled case on May 12, 1964.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals of Maryland, affirming the criminal judgment entered against petitioner by the Circuit Court for Montgomery County, Maryland, was rendered on May 12, 1964, and is reported at 200 A. 2d 368. It is reprinted in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on May 12, 1964. A timely motion for reargument was denied on June 16, 1964. This petition for a writ of certiorari is filed within 90 days of the entry of the May 12 judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether, under the Due Process Clause of the Fourteenth Amendment, a defendant in a state criminal proceeding, having denied guilt, can be deprived of his federal due process right to be heard in a trial of the issues raised by the indictment by:

(a) An arbitrary refusal to honor a withdrawal of a request for acceptance of a *nolo contendere* plea prior to its formal acceptance by the trial court and prior to sentencing; and

(b) An arbitrary refusal to consider or pass upon the merits of a motion to withdraw a *nolo contendere* plea following its formal acceptance but prior to sentencing.

2. Whether, under the Due Process Clause of the Fourteenth Amendment, a defendant in a state criminal proceeding who has a conceded right to contest the propriety of a refusal to permit withdrawal of a *nolo contendere* plea can be held to have waived, by virtue of requesting such a plea, his right to object to the denial of federal due process allegedly involved in the securing of evidence for submission to the indicting grand jury and to the denial of discovery of evidence necessary to his defense.

3. Whether a state criminal indictment provides the adequate notice required by the Due Process Clause

of the Fourteenth Amendment when, in alleging a conspiracy to fraudulently obtain unspecified property "in the custody of" a savings and loan association, it fails to identify the ownership of property and fails to allege any overt acts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV. Section 1:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law.

Rule 723, Maryland Rules of Procedure, Vol. 9B, Annotated Code of Maryland (1963):

Rule 723. Nolo Contendere.

a. *Application—Permission.*

An accused who desires to enter a plea of *nolo contendere* must apply to the court for permission to enter this plea. The court may require the accused to provide such information as it deems necessary to enable it to determine whether or not it will consent to the entry of this plea.

b. *Effect.*

The plea of *nolo contendere* has the effect of submitting the defendant to punishment by the court.

c. *Action by Court.*

Following the entry of a plea of *nolo contendere* the court shall proceed to determine and impose the sentence as on a plea of guilty, but without finding a verdict of guilty.

Article 27, Section 40, Annotated Code of Maryland (1963):

§ 40. Indictment

In any indictment or warrant for the crime of conspiracy, it shall be sufficient to use a formula substantially to the following effect: "That A-B and C-D on the ..... day of ....., 19...., at the County (City) aforesaid unlawfully conspired together to murder X-Y (or other conspiracy here stating briefly the object of the conspiracy), against the peace, government and dignity of the State."

STATEMENT OF THE CASE

On May 17, 1962, seven indictments, containing eighteen counts, were filed in the Circuit Court for Montgomery County, Maryland. They charged petitioner, together with one John G. Persian, with specified crimes of obtaining money under false pretenses, embezzlement and larceny after trust, and conspiracy to commit certain crimes.

More than fifteen months later, on August 20, 1963, the State moved that a *nolle pros* be entered on all charges against petitioner save the fifth count on the conspiracy indictment (No. 4939). As to that count, the trial court purported to accept petitioner's request for entry of a *nolo contendere* plea and ignored efforts both before and after the acceptance to change the plea to one of not guilty so that a trial might be had. Petitioner, having consistently denied guilt and affirmed his innocence, was thereupon sentenced to an imprisonment term of five years.

The Court of Appeals of Maryland affirmed the sentence. In so doing, the Court of Appeals rejected the properly-raised claim that petitioner's rights under the Due Process Clause of the Fourteenth Amendment

had been denied by the summary refusal to consider or permit a withdrawal of the *nolo contendere* request. And the Court of Appeals expressly held that the fifth count of the conspiracy indictment did provide adequate notice of the crime alleged, as required by the Due Process Clause of the Fourteenth Amendment.

The sequence of events which led to the rulings on these federal constitutional claims may be summarized more fully as follows:

A. The Underlying Indictment

Petitioner had been legal counsel and vice-president of the Family Savings and Home Loan Association, Inc., a Maryland corporation. In October, 1961, this association was placed under the jurisdiction of the Circuit Court for Montgomery County upon petition of certain officials of the State of Maryland, and a receiver was appointed to hold and manage its assets. One ground alleged for this action was that the association was insolvent. The subsequent criminal indictments were based in part upon the alleged conduct of petitioner with respect to the association and its shareholders.

The fifth count of the conspiracy indictment, upon which the judgment below was based, alleged that petitioner and Persian, from August 15, 1955, to October 27, 1961, conspired together "by means of diverse false pretenses and representations and other false, subtle means and devices, to fraudulently and deceitfully obtain and acquire unto themselves certain monies and funds, the property in the custody of The Family Savings and Home Loan Association, Inc., a Maryland corporation, tending to the prejudice of the public in general and injurious to the public morals, against the

peace, government and dignity of the State." Ell. This form of indictment was grounded on Art. 27, § 40, of the Annotated Code of Maryland (1963), which requires only that the object of a conspiracy be stated "briefly."

In response to petitioner's motion for particulars, the State asserted that this count meant that the defendants had conspired "to appropriate for their own use and advantage . . . the moneys of the Family Savings & Home Loan Association, Inc., and the moneys on deposit therein and therewith" and that, pursuant to this conspiracy, the petitioner had "directed and diverted funds by making unsecured and unsecurable false and fictitious loans to corporations which he controlled, and to personal friends whom he also controlled, well knowing, that such loans could not be repaid, and that the business practices which he had followed would only result and did in fact result in irrevocable and irreversible insolvency." E26.

But during the hearing with respect to petitioner's request for acceptance of a *nolo* plea as to this conspiracy count, the Deputy State's Attorney made unsworn allegations and references to entirely different facts said to underlie the conspiracy—the salary that petitioner allegedly received from the association, loans alleged to have been made to himself and his brother-in-law, and certain mortgages said to be inadequately secured.

B. The Preliminary Proceedings

In May of 1962 the indictments were returned by the grand jury and a copy of each indictment was delivered to petitioner in open court on May 21. At that time bail was fixed in the amount of $10,000. But there

was no arraignment and petitioner was not asked or required to enter a plea.

No further action occurred for approximately a year, the delay not being at petitioner's request. Then, on May 10, 1963, petitioner learned from newspaper accounts that his trial had been set for June 17, 1963. Petitioner, through his bondsman, advised the court clerk that there had never been an arraignment. Thereafter an arraignment was scheduled for May 22, 1963.

At this arraignment hearing petitioner orally moved to dismiss the indictments on the grounds: (a) that they rested on evidence illegally obtained and illegally presented to the grand jury; (b) that the charges were so contradictory that some, if not all, could not possibly be supported by a showing of probable cause; (c) that each of the counts was too vague and indefinite in alleging an offense to which petitioner could plead; and (d) that petitioner had been denied the right to a speedy arraignment and trial. E48-E49. Among the specific allegations were assertions that the evidence submitted to the grand jury was the result of wire-tapping, illegal entry and trespass in violation of the Fourteenth Amendment and other provisions of the United States Constitution. E48. Petitioner accordingly requested that he be allowed to inspect the records of the grand jury and all court orders, if any, authorizing the tapping of his home and office telephone lines. He also moved for a bill of particulars as to all the indictments, and requested discovery as to all relevant books, records and documents in the custody of either the association or the State's Attorney. E12-E21. All of these requests were said to be essential before petitioner could plead intelligently to the indictments.

The court, critical of petitioner for not having presented these matters earlier, ordered that they be presented formally in written form. E53. Petitioner was then asked to plead to each of the counts of the various indictments. He declined on the ground that he needed more information, as he had requested. The court accordingly ordered that a plea of not guilty be entered as to all counts. E55-E61.

On June 10, 1963, petitioner filed several written motions, among which were motions (a) to dismiss the indictments since they did not state essential facts constituting offenses, as required by the Fourteenth Amendment; (b) to dismiss the indictments since unconstitutional and illegal evidence had been presented to the grand jury; (c) to dismiss the indictments since the federal constitutional guarantees of privacy, free speech, freedom from unreasonable searches and seizures and freedom from self-incrimination had been violated in the securing of evidence submitted to the grand jury. E27. Petitioner further sought by written motion to inspect the grand jury minutes to determine the truth of these allegations and to inspect all the documents and statements in the possession of the State's Attorney. E30, E38. And by motion, petitioner sought the return of seized property and the suppression of such items as evidence, alleging that the property had been seized without warrant, against petitioner's will and by means of illegal eavesdropping. E39. Finally, petitioner moved to dismiss the indictments for want of prosecution, the constitutional rights to a speedy arraignment and trial having been violated. E29.

At a subsequent preliminary hearing on July 8, 1963, petitioner complained that none of these written mo-

tions had been acted on except a request for a bill of particulars. E82. The court ignored this complaint and merely asked if petitioner wished to stand on his not guilty pleas, to which he replied in the affirmative. E82-E83. Toward the end of the hearing, however, the court indicated it would dispose of the pending motions that day. E91.

After a short recess, petitioner's counsel announced that during the recess petitioner had indicated "a desire to waive jury trial in all these proceedings and enter subject to approval of the Court a plea of nolo contendere to count five in case 4939, and the prosecution has indicated that they would dismiss the remaining indictments and all other counts in case 4939." E91. The Deputy State's Attorney confirmed the State's intentions in this regard. Petitioner himself stated on the record that he desired to "submit the plea to the Court for nolo contendere and request probation without verdict on count number five." E92. The court stated that it would take the matter under advisement. E92.

Subsequently, on August 13, 1963, while the *nolo contendere* request was still under advisement, petitioner filed a motion—directed solely to the fifth count of No. 4939—specifically renewing all pending and unacted-upon motions on the grounds therein stated. E42-43, par. 4. No action or ruling was ever made as to this motion, or as to the previous unacted-upon motions.

C. The Nolo Contendere Hearings

On July 15, 1963, an extended hearing was had with respect to acceptance of the *nolo contendere* and probation without verdict requests. E93-E114. Statements for the court's consideration were given on be-

half of the petitioner; and the Deputy State's Attorney and the receiver for the association, contrary to a bench agreement and to Maryland procedural rules, made extensive and unsworn allegations of fact. At the close of this hearing, in which petitioner reiterated his denial of guilt (E96), the court stated that the *nolo* plea had not yet been accepted and that (E114):

> The record reflects that we have had a hearing on the plea of nolo contendere and defendant and his counsel has made a request for a pre-sentence investigation, which the Court will do, and consider the matter very carefully and I will sentence the defendant on the 19th of August, which will be on the nolo contendere plea, if I accept it, and if I do not it will be otherwise. The matter will be disposed of by sentence on the 19th of August.

The final hearing, at which petitioner was sentenced, actually took place on August 20, rather than on the scheduled August 19. At the beginning of that hearing, the Deputy State's Attorney made it clear that the State was *nolle prossing* all the charges save the fifth count of No. 4939, and the court made the record clear in that respect. E117. And in response to petitioner's inquiry whether the docket reflected a waiver of jury trial prior to the dismissal of the other charges, the court replied that "The record indicates that you waive a jury trial and enters a plea of nolo contendere, and it is just now being put down officially." E117. Thereafter the following exchange took place (E118):

> The Court: Mr. Cohen, is there anything you or your counsel would like to say before I proceed to sentence you on Criminal 4939, where you pleaded nolo contendere to the fifth count?
>
> Mr. Cohen: I would like to request of this Court the stay of these proceedings pending matters now pending before the Supreme Court. This is an examination before Mister Justice Black, the motion for petition of prohibition and an applica-

tion for a stay. And there is pending before the Supreme Court an application for a writ of certiorari from it.[1]

In view of that, those proceedings with respect to the request, if this Court will consider a twenty-day continuance before sentencing, the matter should have been resolved within these twenty days.

The Court: The motion will be overruled.

A short discussion about the probation report (which petitioner later found to be in support of his claim of innocence) then ensued, the court indicating that petitioner was free to examine it. The following critical colloquy took place immediately thereafter (E119-E121):

Mr. Cohen: I would like to clarify a little the significance of this plea of nolo contendere. There is some doubt in my own mind. It is my understanding that on a plea of nolo contendere a man may assert his innocence and waive proof of charge, reserving the right to raise all questions that can be raised in arrest of judgment—all questions that can be raised—and a motion for a new trial. I would request that the Court defer his judgment subject to the confirmation or denial of these elements of a nolo contendere plea.

The Court: Mr. Cohen, your attorney—you have an able attorney that has been assisting you and I think you have been well represented in the consequence of these things without us going into any belated discussion about it.

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[1] This was a reference to applications by petitioner made to both Mr. Justice Goldberg and Mr. Justice Black, following denial of relief by a Judge of the Court of Appeals of Maryland, seeking an order prohibiting the trial court from executing its unwarranted threat (E111) to impose a sentence even if the *nolo* plea were rejected. These applications were denied. The threat was later dissipated by the trial court's purported acceptance of the *nolo* plea and by the court's own disavowal of the threat (E120).

Mr. Cohen: I request that the rule on these elements of plea of nolo contendere—

The Court: Is there anything else you would like to say?

Mr. Cohen: In the absence of a ruling, the defendant withdraws the plea for nolo contendere and requests the opportunity for trial.

The Court: I don't understand what really you are asking for. In the Court's judgment you have attempted to spar with the Court now, and last Tuesday you appeared before me with the State's Attorney and that time you asked me about this matter of nolo contendere and I explained it to you in chambers, although I was confident that you knew full well what we were talking about, but at that time I had told you I had decided to accept your plea of nolo contendere, so that is going to be the first docket entry this morning. I am accepting your plea of nolo contendere, as I indicated to you last Tuesday.

Mr. Cohen: At that hearing, Your Honor, you made clear that the ruling before the press and the ruling quoted in the transcript, that you would proceed to sentence whether or not you accepted my nolo contendere plea. That was improperly reported.

The Court: That was one of the reasons for your visit. As I told you I was incorrectly reported in the press. Is that right?

Mr. Cohen: Yes, sir. But at that time you were kind enough to state that you were going to consider accepting the plea subject to your examination of the probation report. I was grateful to you. I am of course still indeed grateful to you.

The Court: The record in the case, you had no previous record, and, for other reasons that I will explain to you, I would accept your plea of nolo contendere. The probation report indicated you have no previous record. So I am going to accept your plea of nolo contendere.

> Mr. Cohen: Since the probation report became a matter of importance—it is a matter of considerable importance to me with my plea. I renew my request to examine that probation report prior to your sentencing.
>
> * * * *
>
> The Court: Let me explain it to you. Nothing turns upon this pre-sentencing report except that with the benefit of that report I have decided to accept your plea of nolo contendere. The rest of the disposition of this case only corroborates what you and your counsel told me about yourselves, goes into great detail about your family and your education. My decision is based upon the case itself as we heard it developed at this hearing on the 15th of July.

Subsequently, after a recess and without hearing any argument or considering any reasons, the court announced (E125):

> Let the record show that Mr. Cohen's counsel has advised the Court that at this time he wishes to withdraw his plea of nolo contendere, and the Court, having already indicated that this plea had been accepted, this motion will be denied.

No other reasons were given for the denial of this motion. The sentencing then followed. Petitioner was sentenced to "be confined in the Maryland Penitentiary for a space of five years." E129.

D. The Court of Appeals Decision

On appeal, the Court of Appeals affirmed the judgment and sentence. In its opinion, the Court ruled:

(1) By pleading *nolo contendere*, petitioner waived his right to object and to appeal as to all alleged procedural defects. He was entitled to challenge only (1)

the validity of the indictment under which he was sentenced, and (2) the propriety of the trial court's refusal to allow him to withdraw the *nolo* plea. Petitioner was thereby held to have waived *inter alia* his objections to the failure to act upon long-standing and renewed motions challenging, under the federal Constitution, and seeking discovery as to the invasions of privacy and the unreasonable searches and seizures by which evidence was secured for presentation to the indicting grand jury.[2]

(2) The trial court did not abuse its discretion in refusing to allow a withdrawal of the *nolo* plea. The attempted withdrawal by petitioner, following the court's refusal to clarify the nature of the plea, was held to have occurred *after* an informal acceptance of the plea—the acceptance having taken the form of the court's inquiry whether petitioner had anything to say before sentencing. Such an inquiry was said clearly to import an acceptance. The Court of Appeals thus sought to avoid petitioner's claim that he had withdrawn the plea *before* the formal acceptance—indicated by such unqualified statements as "I am accepting your plea of nolo contendere" (E120)—and that he was thereby deprived of his federal due process right to be heard on the merits of his defense to the criminal charge against him.

Also ignored by the Court of Appeals was petitioner's further claim that such federal due process right had also been denied by the court's arbitrary denial of the

[2] Also held to be waived were petitioner's protests that he had been denied his constitutional rights to speedy arraignment and trial and that the trial judge had improperly refused to assign the case to another judge in the face of alleged bias and prejudice against petitioner.

later motion to withdraw the *nolo* plea, a denial premised solely on the trial court's statement that the plea had already been accepted.

(3) While conceding that the conspiracy indictment in question "might be considered defective in some of its allegations," the Court of Appeals held that it afforded the adequate notice required by the Due Process Clause of the Fourteenth Amendment despite its failure to identify the ownership of the property in question or its failure to allege that the association had any legal possession or interest in the property. The Court of Appeals further ruled that Art. 27, § 40, of the Annotated Code of Maryland, upon which the indictment was framed, was valid under the Due Process Clause since "the right of the defendant to demand the particulars of the accusation protects him against injury."

REASONS FOR GRANTING THE WRIT

1. IMPORTANT AND NOVEL QUESTIONS CONCERNING THE FEDERAL DUE PROCESS RIGHT TO AN OPPORTUNITY TO BE HEARD IN A TRIAL OF THE ISSUES RAISED BY A STATE CRIMINAL INDICTMENT ARE PRESENTED BY THE DECISION BELOW.

As this Court recognized in *Cole* v. *Arkansas*, 333 U.S. 196, 201, "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." This opportunity to be heard in one's defense, this right to a day in court, has long been acknowledged as "basic to our system of jurisprudence." *In re Oliver*, 333 U.S. 257, 273; and see *Snyder* v. *Massachusetts*, 291 U.S. 97, 105, 116; *Powell* v. *Alabama*, 287 U.S. 45, 68-

70; *Holmes* v. *Conway*, 241 U.S. 624, 632; *Hovey* v. *Elliott*, 167 U.S. 409, 418.

Equally evident is the proposition that "local practice shall not be allowed to put unreasonable obstacles in the way" of vindicating such basic constitutional rights. *Davis* v. *Wechsler*, 263 U.S. 22, 25. The law of the Constitution, in other words, "cannot be evaded by the forms of local practice." *American Railway Express Co.* v. *Levee*, 263 U.S. 19, 21; and see *Rogers* v. *Alabama*, 192 U.S. 226, 230.

In this case the Court of Appeals of Maryland has interpreted and applied the Maryland rules concerning acceptance and withdrawal of *nolo contendere* pleas so as to raise critical questions as to whether unreasonable obstacles have been placed in the path of vindicating petitioner's federal due process right to an opportunity to be heard at a trial on the merits of the criminal charges. More specifically, these questions are:

A. Withdrawal of the Request

Did the petitioner, asserting his innocence, have the right to withdraw before formal acceptance his request for the entry of the *nolo contendere* plea and thereby exercise his due process option to be heard in defense against the criminal charges?

The Court of Appeals of Maryland sought to avoid answering this important constitutional question by holding that the trial court's inquiry—prior to the withdrawal—whether petitioner would like to say anything "before I proceed to sentence you on Criminal 4939, where you pleaded *nolo contendere* to the fifth count", while not a formal acceptance, clearly imported an

acceptance of the plea.[3] But in light of the repeated formal acceptances of the *nolo* request, acceptances which came only *after* petitioner had made his unqualified withdrawal statement, an oblique reference to the intention to impose sentence would seem insufficient to overcome a federal constitutional claim.

Rule 723a of the Maryland Rules of Procedure, like Rule 11 of the Federal Rules of Criminal Procedure,[4] makes a sharp distinction between an application for acceptance of a *nolo contendere* plea and the court's consent or acceptance of that request. The very title of Rule 723a, Application-Permission, reflects this dichotomy; and the content of the Rule speaks first of the defendant's application "for permission to enter this plea" and then of the court's "consent to the entry of the plea." Indeed, the very nature of a *nolo contendere* plea requires that there first be an application, then consideration by the court of that application, and finally acceptance or rejection by the court.[5] And this Court, reflecting that universal distinction,

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[3] This inquiry by the trial court merely reflected its earlier and erroneous view (E114) that it would proceed to sentence petitioner "either on the nolo contendere plea, if I accept it, and if I do not it will be otherwise." The suggestion that petitioner could be sentenced "otherwise" if the plea were not accepted was later repudiated by the trial court. E120. But at the time of the inquiry, the court was merely asking whether petitioner had anything to say before sentence was imposed on some as yet unannounced basis.

[4] Rule 11, Fed. Rules Crim. Proc., provides that "A defendant may plead not guilty, guilty or, with the consent of the court *nolo contendere*."

[5] "The plea of *nolo contendere* cannot be entered by the defendant as a matter of right but is pleadable only by leave of court. Its acceptance by the court is entirely a matter of grace." Annotation, 89 A.L.R. 2d 540, 564.

has spoken of "tender by petitioners and acceptance by the court of the pleas of *nolo contendere*." *Lott v. United States*, 367 U.S. 421, 423, 426.

In this case, the trial court purported to make formal acceptances of petitioner's application for entry of the plea, but only after petitioner had made his withdrawal statement. The court at that point, and for the first time, stated and restated on the record that "I am accepting your plea of nolo contendere" and that "So I am going to accept your plea of nolo contendere" and that "I have decided to accept your plea of nolo contendere." E120, E121. There is thus no occasion to seek to spell out an informal or implied acceptance at some earlier stage, as might be appropriate if no such formal acceptances had been made.[6]

The critical fact emerges that petitioner withdrew his *nolo* request before the court accepted it, the withdrawal occurring at a point where the request was still a revocable tender or offer so that the withdrawal was not subject to the court's discretionary control. It was the failure below to recognize this critical fact—that the withdrawal preceded the purported acceptance—that frustrated petitioner's federal due process right to an opportunity to defend himself against the criminal charges on their merits. That failure, of course, is not binding upon this Court under the guise of an allowable finding of fact. When dealing with constitutional rights under the Due Process Clause, this Court has consistently recognized its duty to apply the applicable standards based upon an independent review of the facts of each case. See e.g.,

[6] Where no formal acceptance has been made, "The fact that the court passed sentence after the accused pleaded nolo contendere clearly imports that the plea had been accepted. On the other hand, hearing of evidence after the plea was tendered shows in the absence of an express statement to the contrary that its acceptance has been refused." Annotation, 89 A.L.R. 2d 540, 569.

Napue v. *Illinois*, 360 U.S. 264, 271; *Watts* v. *Indiana*, 338 U.S. 49, 51.

The intrinsic importance of the due process right claimed by the petitioner and its submersion by the courts below fully warrant review by this Court of the judgment of the Court of Appeals.

B. Abuse of Discretion

Did the petitioner have a federal due process right to have his motion to withdraw the *nolo* plea, following its purported acceptance, heard, considered and resolved on its merits?

This question has federal constitutional dimensions because of the recognized principle that if in any case, "civil or criminal, a state or federal court were *arbitrarily* to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Powell* v. *Alabama*, 287 U.S. 45, 69 (emphasis added); see also *Reynolds* v. *Cochran*, 365 U.S. 525, 530-531. And the question has pertinence here because of the arbitrary refusal of the trial court even to hear or consider the reasons for the request to withdraw the *nolo* plea, a request made by a defendant who had consistently maintained his innocence (E96, E120) and who had expressed serious doubts about the meaning of the *nolo* plea (E119-E120).

In the context of an effort to withdraw a plea of *nolo contendere*, the foregoing constitutional principle would dictate that an adequate opportunity be afforded an accused to be heard in support of any motion to withdraw so that, if the withdrawal be shown to be warranted, the accused may then exercise his federal due process right to proceed to a trial on the merits

of the charges. As was made plain in *United States* v. *Norris*, 281 U.S. 619, 623, "The remedy of the accused, if he thought he had not violated the law, was to withdraw, by leave of court, the plea of nolo contendere, enter one of not guilty, and, upon the issue thus made, submit the facts for determination in the usual and orderly way."

In Maryland, as in most jurisdictions,[7] after a plea of *nolo contendere* has been accepted it is within the court's discretion whether or not to permit its withdrawal. And such discretionary determinations are not reviewable save for gross abuse of discretion. But to escape the gross abuse categorization, a determination must be grounded on a fair hearing and a consideration of relevant factors, particularly where an individual is seeking to establish an opportunity to defend himself against criminal charges. Discretion, in other words, "must be exercised on the basis of sound information, soundly viewed." *Gearhart* v. *United States*, 272 F. 2d 499, 502 (App. D. C.). By submitting reasons for the requested withdrawal of a *nolo* or

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[7] In Michigan and Georgia, *nolo* pleas and guilty pleas may be withdrawn as of right at any time before sentence. See 22 C.J.S. at 1154, 1162. But in most jurisdictions, including the federal courts, a *nolo* or guilty plea, once accepted, can be withdrawn before sentence only by discretionary leave of court.

Rule 32 (d), Fed. Rules Crim. Proc., recognizes that a motion to withdraw a *nolo* plea may be made "before sentence is imposed or imposition of sentence is suspended." Under this Rule, whether a defendant should be allowed to withdraw a *nolo* plea is "a matter resting in the discretion of the trial judge." *Klingstein* v. *United States*, 217 F. 2d 711, 712 (C.A. 4). Contrary to the suggestion of the court below, see pp. 8a-9a, *infra*, therefore, there would appear to be no difference between the Maryland rule as to withdrawal after acceptance and the federal rule embodied in Rule 32 (d).

guilty plea and by having the trial court's informed judgment thereon, the accused becomes entitled to the benefits of the rule that "The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just." *Kercheval* v. *United States*, 274 U.S. 220, 224.

Here, however, the trial court made no pretense of exercising sound discretion with regard to the motion to withdraw. It gave no indication whether withdrawal would be fair and just; nor did it find that withdrawal would prejudice the prosecution.[5] And it made no reference to the Court of Appeals' afterthought (see p. 9a, *infra*) that it was to petitioner's advantage to have the *nolo* plea accepted.[6] Rather, the court simply rejected the motion with the statement that "the Court, having already indicated that this plea had been accepted, this motion will be denied." E125.

But the fact that the *nolo* plea had already been accepted is merely a necessary and assumed predicate of any motion to withdraw. It cannot constitute a sound reason for denying withdrawal. Denial for

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[5] Such a consideration would in any event be misplaced, since any so-called advantage in having the plea accepted or rejected was a factor to be assessed solely by the petitioner.

[6] The reference by the Court of Appeals to the trial court's charge that petitioner was attempting to "spar" with the court (see p. 9a, *infra*) related not to the motion to withdraw but to the withdrawal statement preceding the formal acceptance of the plea. Likewise, the statement of the Court of Appeals (p. 9a, *infra*) that petitioner made no showing of an abuse of discretion was entirely misplaced; if petitioner had an absolute right to withdraw before acceptance, withdrawal is not a matter of discretion and abuse need not be shown. The abuse of which petitioner does complain relates to the subsequent summary denial of the motion to withdraw the plea, an abuse obvious on the record (E125).

that reason alone thus becomes more than an abuse of discretion; it is a refusal to exercise any discretion whatever. As such, the denial is arbitrary. See *Gormley* v. *Bunyan*, 138 U.S. 623.

Just as a state court conviction totally devoid of evidentiary support is a denial of due process under the Fourteenth Amendment, *Thompson* v. *Louisville*, 362 U.S. 199; *Garner* v. *Louisiana*, 368 U.S. 157, so too such a completely arbitrary denial of a motion designed to effectuate a federal due process right to be heard in defense against criminal charges must itself be held to be a denial of federal due process. There was a complete lack of any evidence or justification to support the denial.[9] And the constitutional significance of that denial was further accentuated by the court's summary refusal to explain the nature of the *nolo* plea in response to petitioner's expressed inquiries (E119-E120).

Maintenance of the high standards of the Due Process Clause of the Fourteenth Amendment makes review of the judgment below both appropriate and necessary.

2. IMPORTANT FEDERAL DUE PROCESS QUESTIONS ARE RAISED BY THE RULING BELOW THAT PETITIONER, BY REASON OF THE CONTESTED ENTRY OF A NOLO CONTENDERE PLEA, WAIVED HIS RIGHT TO OBJECT TO ALLEGED PROCEDURAL ERRORS OF A FEDERAL CONSTITUTIONAL NATURE.

Generally speaking, there can be no quarrel with the proposition followed by the court below that the proper entry of a *nolo contendere* plea constitutes a waiver of the right to object to alleged procedural

[9] See also *Rogers* v. *Alabama*, 192 U.S. 226, 231: "... there can be no doubt that if full faith and credit were denied to a judgment rendered in another state upon a suggestion of want of jurisdiction, *without evidence to support the finding*, the court would enforce the constitutional requirement." [Emphasis added.]

defects, even though some be of constitutional stature. As this Court has said, "Ordinarily a plea of *nolo contendere* leaves open for review only the sufficiency of an indictment." *Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 412.

But the applicability of that proposition to this case is highly questionable in light of the following factors:

(1) The doctrine of waiver necessarily assumes that a *nolo contendere* plea has in fact been entered. But if petitioner be correct in his contention that he had a federal due process right to withdraw the tender of the *nolo* plea before it was formally accepted, no such plea was properly entered and the waiver doctrine could not come into effect. Hence waiver is contingent upon resolution of that federal claim.

(2) Since petitioner concededly has the right to contest the validity of the indictment, procedural and other objections that touch upon such validity in terms of the Fourteenth Amendment should not be considered waived. In this case, petitioner has made serious allegations, repeated throughout the proceedings, that the evidence which was submitted to the grand jury was collected by means of illegal wiretaps, unreasonable searches and seizures, and unwarranted invasions of privacy—all in violation of the Due Process Clause of the Fourteenth Amendment. If those allegations had been developed, considered and found to be accurate, petitioner's rights under that Due Process Clause were flagrantly violated. And the indictment itself would be constitutionally invalid. See *Bielicki* v. *Superior Court*, 57 Cal. 2d 602, 371 P. 2d 288; *United States* v. *Tane*, 329 F. 2d 848 (C. A. 2); and see *Mapp* v. *Ohio*, 367 U.S. 643; *Monroe* v. *Pape*, 365 U.S. 167.

(3) The motions which raised these constitutional objections to the evidence underlying the indictment

were relevant to petitioner's defense and to his ability to decide intelligently how to plead to the indictment. And they were also relevant to the question of punishment. Indeed, were the motions well grounded, the trial court itself might have been duty bound to reject the *nolo* plea and to dismiss the indictment. Thus the failure to act on these motions[10] in effect amounted to a suppression of evidence that might have been favorable and helpful to petitioner in terms of guilt or innocence. As such, the suppression violated the Due Process Clause. See *Brady* v. *Maryland*, 373 U.S. 83, 87.

In these circumstances, the failure of the trial court to act upon these motions and the invocation of the waiver doctrine by the Court of Appeals combine to bar consideration and resolution of serious federal constitutional claims. Such a foreclosure warrants plenary review by this Court to insure preservation of petitioner's procedural rights under the Due Process Clause. A state court cannot be permitted to deprive an accused of federal rights by refusing to pass upon motions which raise basic and constitutional fact questions. See *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 703.

3. IMPORTANT QUESTIONS ARE RAISED AS TO THE VALIDITY, UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, OF THE INDICTMENT IN THIS CASE.

The indictment under which petitioner was sentenced alleged a conspiracy, by means of false pretenses, to fraudulently obtain "certain monies and funds, the property in the custody of The Family Savings and

[10] The trial court was duty bound to "hear and determine" all such motions "as promptly as possible" and "before trial." Rules 3e and 725d, Maryland Rules of Procedure.

Home Loan Association, Inc." No overt acts were alleged. No identification of the ownership of the property was made. No assertion was made as to the nature or legality of the custody of the savings and loan association. For ought that appeared, the property allegedly obtained could have been that which rightfully belonged to the alleged conspirators themselves.

The court below properly recognized that this indictment, as well as the statute upon which it was formulated (Art. 27, § 40, Md. Code Ann.), must satisfy the requirement of providing adequate notice of the crime alleged, a requirement imposed by the Due Process Clause of the Fourteenth Amendment. In holding that this requirement was fully satisfied, however, the Court of Appeals created the following federal due process questions that warrant review by this Court:

(1) Did the failure to allege or identify the ownership of the funds or property allegedly taken by false pretenses result in inadequate notice? Lord Campbell, C.J., long ago ruled that, where property has allegedly been taken by false pretenses, there is a "necessity of showing [in the indictment] to whom the goods belonged." *Sill* v. *Reg.*, Dears. Cr. Cas. 132, 1 El. & Bl. 553. And that requirement has generally been followed in American jurisdictions, including Maryland. *State* v. *Blizzard*, 70 Md. 385, 17 A. 270 (indictment for false pretenses must distinctly allege ownership of property or securities obtained); *Armacost* v. *State*, 133 Md. 289, 105 A. 147 (information invalid for failure to designate owner or nature of property).

The Court of Appeals sought to sustain the instant indictment not by its own wording but by the court's

assertion that the savings and loan association was in lawful possession of the funds, or at least had a legal interest therein, so that it would be illegal fraudulently to obtain such funds. But the indictment itself did not allege either lawful possession or legal interest on the part of the association. There was nothing more than a naked assertion of taking unidentified property "in the custody of" the association. Without some identification of ownership or assertion of lawful possession the inadequacy of the required notice is patent. "For ought that appears the defendant himself may have been the owner and holder of the [property]." *State* v. *Blizzard*, 70 Md. 385, 17 A. 270, 272.

(2) Was the indictment or the underlying statute, Art. 27, § 40 (Md. Code Ann.), saved by the discretionary availability of a bill of particulars?

The Court of Appeals could not sustain the indictment purely on its face. And it made no attempt to sustain the constitutionality of this statutory provision by reference to its language—which requires only that the object of a conspiracy be stated "briefly." Rather the validity of the statute was said to rest on "the right of the defendant to demand the particulars of the accusation." See p. 11a, *infra*.

But in Maryland a defendant "is not entitled as of right to particulars. Rule 715a provides that on motion by a defendant, the court may order the filing of a bill of particulars. But in most cases the grant or refusal of particulars is within the sound discretion of the trial court." *Pearlman* v. *State*, 232 Md. 251, 192 A. 2d 767, 773. Hence is raised the precise question reserved by this Court in *Hodgson* v. *Vermont*, 168 U.S. 262, 272, where, having found that under Vermont law a defendant was entitled as of right to par-

ticulars and that such a right saved what might otherwise have been an invalid indictment, the Court expressed no opinion as to the result where particulars are not a matter of right. The Court did remark, however, that if particulars were discretionary "it would strengthen the criticism urged against the information."

The substantiality of this problem is further emphasized by this Court's more recent opinion in *Russell v. United States*, 369 U.S. 749, 770, where emphasis was placed on the federal court rule "that a bill of particulars cannot save an invalid indictment" since otherwise "a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." See also Orfield, Criminal Procedure from Arrest to Appeal 238-248 (1947).[11]

Thus is presented the important question under the Due Process Clause of the validity of the indictment and of the underlying statute in the light of a discretionary opportunity—rather than a mandatory right—to obtain particulars.[12]

(3) The ruling below that an indictment for conspiracy, in satisfying the federal due process notice requirements, need not allege any overt acts raises a novel and important constitutional issue, one that has not heretofore commanded the attention of this Court.

[11] Such apparently is also the general rule in Maryland—"a bill of particulars forms no part of an indictment and hence cannot make an otherwise defective indictment good." *Sciamón v. State*, 230 Md. 305, 187 A. 2d 109, 113.

[12] The hazards involved in seeking to implement an indictment by particulars are illustrated in this case by the discrepancies between the indictment charges, the particulars and the oral representations by the State in open court. See pp. 5-6, *supra*.

It is an issue that arises in the context of an indictment and of an underlying statute that fail to identify or to require identification of the ownership or nature of the property which was at the core of the object of the alleged conspiracy. Without some allegations of overt acts, such an indictment remains uncertain and the petitioner is not adequately apprised of what he must be prepared to meet.

Overt acts, in these circumstances, might well be the *sine qua non* of the indictment's validity, for only in that manner could the petitioner be informed of the facts and circumstances which identify the general offense with which he was charged. See *United States v. Hess*, 124 U.S. 483, 487. And only by specifying such overt acts could one be sure that the grand jury had in mind the same overt actions as the judge and prosecutor, actions which supposedly give substance to an otherwise poorly identified conspiracy. *Russell v. United States*, 369 U.S. 749, 770. In the absence of asserted overt acts, no protection is afforded the petitioner from again being put in jeopardy for allegedly conspiring to commit the same actions.

CONCLUSION

For these various reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals of Maryland.

Respectfully submitted.

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